United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1649

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1649

EXXON CORPORATION, successor by merger to
ESSO INTERNATIONAL, INC.,

Plaintiff-Appellee,

—against—

A. L. BURBANK & COMPANY, LTD.,

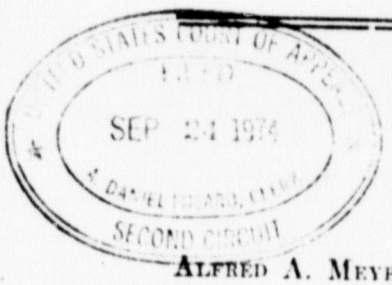
Defendant-Appellant,

—and—

UNITED STATES OF AMERICA,

Defendant-Appellee.

REPLY BRIEF FOR APPELLANT A. L. BURBANK & COMPANY, LTD.



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Statement

The brief of Appellee United States of America ("USA") reveals a failure to fully comprehend the position of Appellant A. L. Burbank & Company, Ltd. ("Burbank"), in the within suit and thus USA attributes to Burbank a legal theory never advanced by Burbank at either the trial or the appellate level. USA argues in its brief that Burbank belatedly asserts a breach of contract theory (pp. 4, 5).

In fact, Burbank's position is one of simple equity and is fully set forth in Burbank's brief heretofore filed herein.

Reply to USA's Point I

In its brief, USA argues (pp. 4, 5) that Burbank has raised the breach of contract theory for the first time on appeal and then USA describes (p. 5, lines 15-11 from bottom) Contracts MA-3927 and MA-3928 as agreement between "Maritime Administration, *Burbank* and the vessel's owner" (italics ours). The fact is that Burbank was not a party to either of the said contracts (A 13a, 22a) and no breach of contract theory has ever been advanced by Burbank.

USA admits that Burbank's equitable position was presented at trial (p. 4, lines 9-5 from bottom) and it is this position which is the basis for the within appeal. Burbank's trial briefs (Record, Doc. Nos. 41, 43, 44) relied upon the same equitable argument that Burbank's appeal brief sets forth and Burbank's appeal brief cites the same reported case and contract (MA-3928) that was cited to the trial court. USA is correct in stating (p. 4) that Burbank does not appeal from the trial court's determination of the agency question.

It is submitted that the "reasonable interpretation" of Contracts MA-3927 and MA-3928 set forth in USA's brief (p. 5, lines 15-7 from bottom) defies the simple, plain meaning of the contract terms and would permit USA at its whim to deny payment of the Vessel's incurred operating expenses. Contract No. MA-3928 (A 21a, para. 3ii) provides that charter hire (i.e. earnings of the Vessel) shall be held (in the Cash Collateral Account) until "Maritime

(i.e. USA) shall have determined the amount (if any) to be paid to the Company (or its agent) for the continued current operation of the Vessel; . . . " The plain meaning of these words must be that the Vessel's operating expenses will be paid after USA is satisfied as to the type and amount of these expenses, and not that USA can decide at its whim whether or not to pay a properly incurred operating expense in a known amount. Certainly, in view of the aforesaid plain language, the payment procedures established by USA and Irving and the conduct of USA (all set forth in Burbank's appeal brief herein), Burbank's reliance on the former interpretation is justified.

Reply to USA's Point II

In *First Nat'l Bank* v. *Dudley,* 231 F.2d 396 (9 Cir. 1956), the court recognized (p. 398) that the bank had a right of set-off under the Bankruptcy Act which would be applicable unless there were circumstances which rendered its application inequitable. The court found such circumstances in, among other things, the bank's agreement to the pro-rata payment arrangement and the creditors' reliance on this arrangement (p. 402 [8-10]). Therefore, the court applied the doctrine of equitable estoppel to deny the bank's claim of set-off (pp. 400-1 [5, 6]).

In the within case, there is no such statutory right of set-off in favor of USA. This case involves USA's agreement and participation in the payment arrangement established by Contract No. MA-3928 (which specifically provided for payment of the Vessel's operating expenses) and Burbank's reliance thereon.

In its brief (p. 9, lines 16-23; p. 3, lines 18-26; p. 6, lines 3-11), USA asserts that Burbank made no timely application for the transfer of funds into the Special Account in order to pay the Invoice. USA ignores the facts set forth on page 6 of Burbank's appeal brief. The Invoice *was* included in Burbank's request for transfer of funds by letter dated December 3, 1965, with expense statement attached. There were insufficient funds in the Cash Collateral Account to pay all expenses at that time. Sufficient funds were received later in December, 1965, but these funds were withdrawn by USA on January 6, 1966 without payment of any outstanding expenses. If USA is contending that Burbank should have *re*-submitted the *same* expense statement after December 29, 1965 (when the final funds were received into the Cash Collateral Account), and before January 6, 1966 (when the funds were unilaterally withdrawn by USA without notice to Burbank), it is respectfully submitted that this contention is absurd under the circumstances.

Reply to USA's Point III

USA's contentions hereunder have been answered under Point II of Burbank's appeal brief and in the within brief.

CONCLUSION

The judgment and decree of the District Court dismissing the cross-claim of Burbank against USA should be reversed and judgment should be entered in favor of Burbank and against USA for $31,111.00, plus costs and disbursements.

Respectfully submitted,

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